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Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

MM Docket No. 91-221

In the Matter of	)
	)
Review of the Policy Implications of the	)
	)
Changing Video Marketplace	)

COMMENTS OF THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

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November 21, 1991

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The Association of Independent Television Stations, Inc. ("INTV"), by its counsel, hereby submits its comments in response to the Commission's *Notice of Inquiry*, FCC 91-215 (released August 7, 1991) [hereinafter cited as *NOI*] in the above-captioned proceeding. INTV is a non-profit incorporated association of independent television stations (*i.e.*, broadcast television stations not affiliated with one of the three major national broadcast networks). INTV's membership includes over 100 of the nation's independent television stations.

Independent stations hvae assumed a vital position in the video marketplace, contributing greatly to competition in the video, programming, and advertising marketplaces, as well as enhancing the diversity of programming and viewpoints available to the entire viewing public. The Commission recently acknowledged the contribution of independent television to the video marketplace and the public interest:

> Local broadcasting is a vital service to the American public, and the independent television sector is critical to the vitality of that service.[1]

Independent television's contribution to the public welfare and its special vulnerability to recent changes in the video marketplace must remain among the Commission's primary concerns in this proceeding.

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[1]*Report and Order*, MM Docket No. 90-162, FCC 91-114 (released May 29, 1991) at ¶76 [hereinafter cited as *FISR*].

I. SUMMARY

INTV's positions and proposals are summarized as follows:

- The Commission must regulate in the public interest pursuant to its statutory mandate in the Communications Act of 1934.

- The primary public interest goals of video marketplace are diversity and localism. Competiton also is a significant goal. In furtherance of thses goals, the Commission has adopted regulations designed to foster a nationwide broadcast television service, available to all without charge and providing a diverse and locally-responsive program service to the public. The Commission has succeeded in large part in developing such a broadcast television service.

- Regrettably, the Commission also has neglected the effect of cable television expansion and development on broadcast television service, so much so that the Commission staff now finds the broadcast television industry in "an irreversible long term decline." What the broadcast industry long ago warned the Commission now has come to pass.

- Independent television stations play a vital role in the video marketplace; their service must not be placed in jeopardy by well-intentioned, but ill-conceived efforts to "save" the networks. The "big three' networks remain the uniquely positioned and still quite dominant in the video marketplace. They remain the sole purveyors (and buyers) of top quality programming. They alone reach the entire viewing audience. Thus, the networks remain the gorillas of the video marketplace. Smaller species may play at their feet; some may nip at their heels. Some may even feed at a trough once the exclusive domain of the gorilla, but none yet surpass the gorilla in strength and size. Therefore, actions to preserve the ability of broadcasting to remain a viable competitor in the video marketplace must not overlook the continued strength of the three networks and the need to preserve a competitive environment among segments of the broadcast industry.

- The Commmission has recommeded repeal of the compulsory license. Only Congress may repepal the comulsory license.However, this hardly absolves the Commission from advancing a sound regulatory program of its own to deal with issues arising from the effects of cable television on broadcast service.

- **INTV RECOMMENDATION NUMBER ONE:** Local signal access ("must carry") rules must be adopted immediately. The Commission may view this as "second best" to repeal of the compulsory license or establishment of a retransmission consent requirement, but second best is far more beneficial than the current grossly unbalanced and unacceptable state of affairs. The lack of cable carriage would devastate the financial viability of a local broadcast television station. Many already have been severely affected. INTV, therefore, urges the Commission to complete the "must carry" phase of its effective competition proceeding and promptly adopt rules assuring local stations of access to their audiences.

- **INTV RECOMMENDATION NUMBER TWO:** Rules prohibiting ownership of cable television systems by networks must be maintained. Additional vertical integration of cable systems and program or signal providers will only exascerbate the problems caused by common ownership of cable program networks and cable systems. Cable The new and greater incentive and ability to discriminate in carriage of local broadcast television signals poses a distinct threat to preservation of the diversity of local service now provided by broadcast teelvision stations. Furthermore, cable and the networks are the two giants of the video marketplace. Permitting the merger of elements of the two giant video providers would enhance their existing dominance and dwarf all other competitors in the market and especially independent television stations. On the other hand, ownership of a local cable system by a broadcast television station in the market would not necessarily compound the size and power of the two dominant participants in the video marketplace. Some struggling stations may be helped by cable ownership. Therefore, INTV urges a very cautious approach to modification of the broadcast station-cable system cross ownership prohibition.

- **INTV RECOMMENDATION NUMBER THREE:** The Commission should consider relaxation of the duopoly rule. Options to be considered should include, for example:

    - Repealing the duopoly rule for television.
    - Prohibiting overlap of only the Grade A contours of co-owned television stations.
    - Prohibiting only VHF-VHF overlaps.
    - Limiting the number of overlapping stations to two.
    - Permiting co-ownership of co-located UHF stations.

  Relaxation of the duopoly rule would enhance the opportunity for fuller development of broadcast television service both today and into the future. Economies of scale in operation from colocated stations could result in substantial cost savings. INTV urges the Commission to commence a rulemaking proceeding looking toward repeal or significant relaxation of the television duopoly rule.

- **INTV RECOMMENDATION NUMBER FOUR:** The "12-12-12" Rule should be relaxed to exclude UHF stations. UHF independents are especially vulnerable in today's video marketplace, as OPP has found. Sound financial operation is especially critical in light of the upcoming need to invest in ATV facilities.

- **INTV RECOMMENDATION NUMBER FIVE:** The "One-to-a-Market" Rule should be repealed. More stations would be viable in both services. In radio, AM is in a perilous situation; UHF television struggles in a cable world. Both services could benefit from common ownership with a financially secure, well-managed licensee of a VHF or FM station.What also is now highly ironic is the fact that a single cable operator can control over 30 channels of television service to a majority of viewers in a community, while a competing television station cannot even own a radio station in the same community, absent a waiver of the Commission's rules.

- **INTV RECOMMENDATION NUMBER SIX:** The network rules should be retained, especially the Prime Time Access Rule, one of the most striking examples of a regulation accomplishing its intended goal. The other rules regulating the network-affiliate relationship should be retained unless a substantial showing is made that they no longer are necessary or beneficial.

- **INTV RECOMMENDATION NUMBER SEVEN:** The Commission should examine and curb practices in programming acquisition which deny broadcast stations and their viewers access to popular program types. Such practices include:

  - "Generic" exclusivity *a la* ESPN's esclusive Wednesday night Major League Baseball window.

  - Migration of popular sports event telecasts to cable or pay media.

  - Extended network series program exclusivity.

- **INTV RECOMMENDATION NUMBER EIGHT:** Stations should be presumed to be significantly viewed throughout their ADI's. This will remove a roadblock to carriage of many UHF independent stations within their market areas. With fewer and fewer non-cable households, demonstrating off-air viewing prohibitively expensive. A presumption of significant viewing would alleviate this cost factor and do little more than recognize the market areas of stations as established through industry practice.

- **INTV RECOMMENDATION NUMBER NINE:** Cable systems should be required to carry broadcast signals in their entirety. If cable operators are, as they say, no more than antennas, they should function in the same indiscriminate fashion. Furthermore, the no-fee compulsory license for local signals never was intended to facilitate "cherry picking" and composite channels.

II. THE LANDSCAPE OF THE NEW VIDEO MARKETPLACE

A. THE STATUTORY MANDATE FOR LOCALISM AND DIVERSITY

The Commission has been authorized by Congress to regulate broadcast television in the public interest. The Commission must exercise its power within this established legal framework, embodied in the Communications Act of 1934. The primary elements of the public interest as long recognized by the Congress, the Commission, and the courts are localism and diversity of voices. Competition, which drives national economic policy, also is a factor, but hardly the sole determinant of communications policy. Competition in the video marketplace is highly imperfect. Technical limitations on the number of television channels prevent a market with open entry. Cable television is a natural monopoly gatekeeper of access to the local video marketplace. Regulation to maximize the diversity of voices and the local orientation of service in the local video marketplace, therefore, has been and remains essential to assure that the public interest is served.

This is no small matter. As the Commission has recognized:

> Basic to our form of government is the belief that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." (*Associated Press v. United States*, 326 U.S. 1, 20 (1945).) [footnote omitted] Thus, our constitution rests upon the ground that"the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market." Justice Holmes dissenting in *Abrams v. United States,* 250 U.S. 616, 630 (1919).

> These principles, upon which Judge Learned Hand observed that we had staked our all, are the wellspring, together with a concomittant desire to prevent undue economic concentration, of the Commission's policy of diversifying control over the powerful medium of broadcasting. For, centralization of control over media of mass communications is, like monopolization of economic power, per se undesirable. The power to control what the public hears and sees over the airwaves matters, whatever the degree of self-restraint which may withold its arbitrary use.
>
> It is accordingly firmly established that in licensing the use of the radio spectrum for broadcasting, we are to be guided by the sound public policy of placing into many, rather than a few hands, the control of this powerful medium of public communication.[2]

Therefore, the Commission must proceed with caution. Core values of the nation are at stake.

Regulation also must continue to conform to the obligations placed on the Commission and broadcast licensees by Congress and to prevent the welfare losses threatened by imperfections in the marketplace. Broadcast licensees must satisfy "character" qualifications, must seek renewal of their licenses every five years, and must secure prior approval of the Commission for any transfer of control of the licensee. License renewal applications are subject to competing applications and petitions to deny. The Commission also has the authority to revoke a broadcast license at any time during its term. Broadcast television stations remain bound by statutory obligations to provide programming dealing with issues of importance in their communities, responding to the educational and informational needs of children, and providing candidates for political office access, low rates, and equal opportunities *vis-a-vis* opposing candidates. Broadcast licensees also are

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[2]*Multiple Ownership Rules*, 22 FCC 2d 306, 310 (1970).

subject to numerous other requirements governing the operation of their stations and content of their programming.

To assure an equitable distribution of broadcast services, as required by the Communications Act, the Commission has implemented a nationwide scheme of channel allotments.[3] This so-called Table of Allotments was structured to assure that to the greatest extent technically possible communities receive service in accordance with their needs. Thus, for example, whereas most communities have been allotted multiple channels, more channels have been allotted to larger communities. It assures that a diversity of local service is available to as many communities as possible. In line with the spirit of the Table of Allotments, the Commission

> [H]as sought, over the years, to fulfill its mandate to foster a mass communications framework conducive to the "public interest, convenience and necessity" by relying on two principal values: localism and diversity.[4]

Regulation of the video marketplace must reflect the diversity and local-orientation of television service engendered by the Commission in fulfilling its mandate under the Communications Act. The public benefits are far too great to dismiss, despite the often

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[3]*Television Assignments*, 41 FCC 148 (1952) (wherein the Commission stated its goal that "as many communities as possible should have the opportunity of enjoying the advantages that derive from having local outlets that will be responsive to local needs") Similarly, as Congress declared in enacting the All-channel receiver Act of 1962:

> The goal which is being sought is a television system which will serve all the people, encourage local outlets, foster competition -- particularly in larger markets -- and meet educational needs.

H.Rep. N. 1559, 87th Cong., 2d Sess. 3,9 (1962). A listing of the current use (as of August 1, 1991) of all allotted television channels is attached hereto as Exhibit 1.

[4]*1990 CableReport*, 5 FCC Rcd 4962, 5037 (1990)[hereinafter cited as *Report*].

superficial dazzle of new technologies of video distribution. The Commission has acknoledged that:

> Today, both radio and television reflect our diverse nation. In city after city, locally-originated news and public affairs programs generally provide information of interest primarily within a station's coverage area. Most Americans are able to choose daily from a number of television channels and hours of local programming to learn what happened at the city council meeting or to find out about tomorrow's weather.[5]

Therefore, broadcast television -- and independent television stations -- have been and continue to provide the befefits spawned by the Commission's embrace of localism and diversity as the keystone values inherent in its statutory obligation to regulate in the public interest. Those values have served the Commission and the public well.[6] The Commission must not forsake them today.

B. THE DRAMATIC EVOLUTION OF THE VIDEO MARKETPLACE WITH THE SPREAD OF CABLE TELEVISION AND ITS EFFECT ON BROADCAST TELEVISION SERVICE (OR "WE TOLD YOU SO!")

The Commission rightly has concluded that the video marketplace has changed drastically with the spread of cable television. Ironically, the deleterious effects of cable television on broadcast service were predicted. However, the Commission largely ignored those predictions, often appearing driven by a blind infatuation with promoting emerging cable technology rather than preserving broadcast television service to the public.

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[5] *Id.*; *see also* Comments of INTV, MM Docket No. 90-4 (filed September 25, 1991) at 32 *et seq.*

[6] The Commission staff appears to have suggested a contrary view in some respects. Setzer, Florence, and Levy, Johnathan, "Broadcast Television in a Multichannel Environment," OPP Working Paper Series, No. 26 (June, 1991), 6 FCC Rcd 3996 (1991) [hereinafter cited as "OPP Paper"]. However,

Consequently, the Commission permitted massive subsidization of the cable industry by broadcast television.[7] Now, having fed liberally on broadcast television for three decades, cable has become the vertically-integrated media giant capable of completely devouring broadcast television. Already cable has damped the fire of expansion in independent television. Already consumers find popular program genres like sports and recent motion pictures previously available for free on broadcast television available only on cable and only for a fee.

A few "word-bites" from the OPP Paper confirm the plight of broadcast television:

- The broadcast television industry has suffered an irreversible long term decline in audience and revenue shares, which will continue through the current decade.[8]
- ...[A]dvertising revenues per station in fact have fallen in the neighborhood of 4 per cent per year in real terms from 1987 on.[9]
- Losses of UHF independents averaged over 20 percent of net revenues from 1986 to 1988, falling to 13.7 percent in 1989.[10]
- At least 25% of stations in the top ten markets experienced losses.[11]

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the staff's premises are faulty in several respects. *See* INTV Staff, *A "Mini-Critique" of the OPP Paper* (November, 1991) [hereinafter referred to as *Critique*], a copy of which is attached hereto as Exhibit 2.

[7]A brief history of cable television and the compulsory license is attached hereto as Exhibit 3.

[8]OPP Paper at 159.

[9]*Id.* at 128.

[10]OPP Paper at 38. The average UHF independent had a 7.2% loss in 1990. NAB/BCFM Financial Report (1991) at 102.

[11]OPP Paper at 35.

- Profits of independents have fallen far more than those of affiliates.... Looking at all day viewing rather than prime-time viewing, the share of local independents only increased from 12 to 13 percent between 1984/85 and 1989/90. Thus, it is not surprising that independents' average profits plummted during this period.[12]

- Television stations typically sold at prices between 10 and 12 times cash flow during the 1980s, but now are reported to be selling at seven to eight times cash flow. Clearly, beliefs concerning future profits of television stations have adjusted downward in the recent past.[13]

- Broadcasters' revenues fell over much of the late 1980s while programming costs increased, resulting in declining profits or increasing losses for all classes of stations, with heavy losses concentrated among UHF independents and small-market stations. Independents appear to have a reprieve in 1989. Unless the longer-term trend reverses, a shakeout could well occur.[14]

- Some marginal stations will probably leave the market...[15]

- In the markets below the top ten, more than half of all independent stations are already experiencing losses, at least on paper. Here a reduction in the number of stations may occur...[16]

That 32 UHF permittees have forfeited their construction permits rather than construct the facilities they fought so hard to obtain should come as no surprise.[17]Similarly unsurprising is the fact that 13 UHF permittees began operation only to go dark.[18]Broadcasters vainly

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[12]*Id.* at 38.

[13]*Id.* at 40.

[14]*Id.* at 46.

[15]*Id.* at 160.

[16]*Id.* Numerous other assertions by the staff with respect to cable television and its effect on and interrelationship with broadcasting reflect misperceptions or erroneous premises or conclusions. *See Critique.*

[17]Comments of INTV, MM Docket No. 90-4, *supra*, at 63.

[18]Reply Comments of INTV, MM Docket No. 90-4 (filed October 25, 1991) at 18, Exhibit C.

warned the Commission of the inevitable consequences of promoting cable at the expense of broadcasters. Now those consequences have risen from what once was dismissed as self-serving speculation to a true decline in broadcast service to the public.

C. BROADCAST TELEVISION NETWORKS: STILL THE GORILLAS OF BROADCASTING.

The independent television segment of the broadcast industry continues to play a vital role in the video marketplace and must not be sacrificed to strengthen networks. The present three network structure, as opposed to a four, five, or six network structure, was formed by the Commission's 1952 Table of Television Channel Allotments, which provided only three channels to all television households. The unique ability to reach the entire country has enabled the three networks to provide a valuable national television service to the public. This service also has supported beneficial local service from network affiliated stations across the country.

Nonetheless, in many communities, more than three television channels have been allotted. While some of these additional channels have formed the base of the Fox, a near-100% part-time fourth network, numerous channels have been utilized to provide truly independent television service. These non-network services contribute substantially to the diversity of voices in their locales and provide a program service shaped by decisions made exclusively at the local level. Their service should not be placed in jeopardy by overreaction to the allegedly declining position of broadcast network television in the video marketplace.

A comparison of the various competitors in the video marketplace today confirms the continued pre-eminence of the networks. The networks remain the largest, most prevasive providers of mass appeal video programming. Only the networks reach large nationwide audiences every day and night. Each network's audience still dwarfs the audiences of every cable network and independent station. Only the networks acquire programming designed to appeal to and supported by the largest audiences in the video marketplace. Thus, the networks remain the gorillas of the video marketplace. Smaller species may play at their feet; some may nip at their heels. Some may even feed at a trough once the exclusive domain of the gorilla, but none yet surpass the gorilla in strength and size. Therefore, actions to preserve the ability of broadcasting to remain a viable competitor in the video marketplace must not overlook the continued strength of the three networks and the need to preserve a competitive environment among segments of the broadcast industry.

The Commission already has reconfirmed the uniquely powerful position of the networks in the video marketplace.[19] The following excerpts from the Commission's recent decison to retain, but relax the network financial interest and syndication rules illustrates that the networks still are the big kids on the block:

- [T]he networks continue to benefit from historical structural advantages -- *e.g.*, owned and operated stations on the most desirable frequencies in the largest television markets and a longstanding affiliate distribution system -- which give them by far the greatest hold over the nationwide television audience and those who seek to reach it. Network television is the only programming service available to virtually all (98%) American television households.[20]

- Individually, each of the networks still retains a share of the prime time viewing audience greater than that of all cable networks combined and all independent television stations combined. Even in cable

[19] *FISR* at ¶¶38-47.

households, the networks collectively still garner over 60 percent of all prime time viewing.[21]

- [T]he networks remain the preferred buyers for producers seeking outlets for prime time entertainment programming.[22]

- [S]ince the networks continue to receive the vast majority of national television advertising revenues (roughly 80 percent) and to command advertising rates substantially higher than those of other competitors, they also are able to pay license fees for prime time entertainment series which generaly are considerably higher than those offered by alternative buyers.[23]

- [T]he networks also remain virtually the sole purchasers of prime time entertainment series capable of successful syndication.... Indeed, even the most highly-viewed cable or first-run entertainment programs do not reach as large an audience as even a moderately successful television network entertainment program.[24]

The OPP Paper in some other respects appears out of synch with the Commission's findings and conclusions concerning network power.and position in the video marketplace.[25] Nothing the staff says, however, can obscure the continuing reality of network dominance of the video marketplace.

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[20]*Id.* at ¶38.

[21]*Id.* at ¶39.

[22]*Id.* at ¶40.

[23]*Id.*

[24]*Id.* at ¶41.

[25]*See Critique.*

D. ONLY CONGRESS MAY REPEAL THE COMPULSORY LICENSE OR IMPOSE A RETRANSMISSION CONSENT REQUIREMENT ON CABLE.

Whereas the Commission has recommended repeal of the compulsory license, only Congress may amend the copyright law to eliminate the compulsory license or amend the Communications Act to require cable systems to secure retransmission consent from broadcast stations.[26]

This hardly absolves the Commission from advancing a sound regulatory program of its own.

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[26] *Report* at 4973 .

III. INTV'S RECOMMENDATIONS

A. LOCAL SIGNAL ACCESS ("MUST CARRY") RULES MUST BE ADOPTED IMMEDIATELY.

The Commission must respond to its findings about the effects of cable television on broadcast service and follow through on its own recommendations concerning cable television. The Commission must invoke its own authority and adopt local signal access requirements to assure that cable systems may not use their gatekeeper position in the local video marketplace to deprive local stations of access to the local audience. The Commission may view this as "second best" to repeal of the compulsory license or establishment of a retransmission consent requirement, but second best is far more beneficial than the current grossly unbalanced and unacceptable state of affairs. In any event, the compulsory license requires no payment for local signal carriage precisely because at the time the compulsory license was enacted, cable systems were required to carry local signals. Furthermore, neither repeal of the compulsory license nor imposition of a retransmission consent requirement on cable systems will assure the continued viability of broadcast television. In either case, the primary beneficiary would be the program supplier whose programs constitute the bulk of broadcast television programming. Moreover, only stations or programs selected by the cable operator would be shown. Many stations, especially those with formats competing with cable network programming, would be neither paid, nor even carried by the system. Elimination of the compulsory license also might create incentives for networks or other program suppliers to by-pass local stations and sell directly to cable. The lack of cable carriage or the loss of popular programming would devastate the financial viability of a local broadcast television station. The Chairman of the Commission made precisely that point in recent testimony before the Senate Communications Subcommittee:

> I think with respect to being taken off the altogether, the station would probably fail. I think in terms of repositioning the station is going to have to spend more on advertising to overcome the difficulty.
>
> I think in the case of a new station not being granted "must carry" it will depende in part -- because you see at the point the station is coming in presumably with their eyes wide open, and I think there have been instances where broadcasters coming in with their eyes wide open have done some imaginative programming and have essentially kind of forced carriage because of the popularity of their programming. But, again, it is clear that it would be a much more arduous task without carriage for the new stations.[27]

Few words could more persuasively underscore that access to cable audiences and attractive programming are the essential ingredients of success in broadcast television.[28]

The Commission already is considering adoption of local signal access rules in its cable effective competition proceeding. INTV urges the Commission to complete that phase of the proceeding promptly and to adopt rules assuring local stations access to the audiences they ahve been licensed to serve.

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[27] Testimony of Alfred C. Sikes, Chairman, FCC, before the Senate Subcommittee on Communications, June 20, 1991, tr. at 46-47. Somewhat neglected in the Chairman's remarks is the fact that many entrepreneurs who sought entry into the television business filed applications prior to the demise of must carry rules, only to find after years in the comparative hearing process that the station they had "won" might have been less a prize than they originally anticipated in light of the demise of the must carry rules.

[28] A more extensive discussion of the evidence and rationale supporting adoption of local carriage rules appears in INTV's Comments and Reply Comments in MM Docket No. 90-4, filed September 25, 1991, and October 25, 1991, respectively. Notably missing from the OPP Paper is any consideration of a critical element of the cable-broadcast interface -- the price disciplining effect of broadcast stations on cable rates.

B. CABLE-NETWORK CROSS-OWNERSHIP RULES MUST BE RETAINED.

Rules prohibiting ownership of cable television systems by networks must be maintained. Additional vertical integration of cable systems and program or signal providers will only exacerbate the problems caused by common ownership of cable program networks and cable systems. The incentive and ability to discriminate in carriage of local broadcast television signals poses a distinct threat to preservation of the diversity of local service now provided by broadcast television stations. Furthermore, the traditional fear that a network might acquire numerous cable systems has been turned on its head. The prospect of a large cable MSO acquiring a broadcast network may be a more rational concern in today's video marketplace.

The need for the rules never has been greater. Whereas the Commission no longer ought be concerned that networks might hinder cable growth and development, it faces an even greater concern today. Cable and the networks age the two giants of the video marketplace today. Cable is a virtual monopoly provider of video service to over 60% of the nation's television households, while the networks still uniquely serve nearly all television households. Major MSO's dominate the cable industry. Only three full-time networks offer instantaneous access to the entire universe of television households. Permitting the merger of elements of the two giant video providers would enhance their existing dominance and dwarf all other competitors in the market and especially independent television stations.

The effects on various markets would lessen competition and stifle diversity. First, broadcast signal carriage decisions by network-owned cable systems would be influenced by the network's competitive agenda. This is just a variation on a familiar theme. The Commission has found that:

> Cable and broadcast programming compete for advertising revenues. Cable operators' incentives to deny carriage or to provide disadvantageous carriage (*e.g.*, frequent or ill-timed channel repositioning) to program services in which they have no financial interest appears to be particularly great as against local broadcasters. This creates a market disadvantage in local commercial broadcasters' ability to compete against cable operators for advertising revenue.[29]

In the case of a broadcast network cable owner, the incentive would be even greater. The network and its local affiliate, as well as the cable system and affiliated cable networks, if any, would be a competitor of every local television station in the national and local advertising markets.[30] Thus, the incentives to discriminate against local stations in carriage decisions would be badly exacerbated by network ownership of cable television systems.

Furthermore, advertisers would be buying from one seller in the market which sold time on a broadcast network, *the* local cable system, and, possibly, several cable networks (*e.g.*, CNBC, ESPN), to say nothing of the network's local affiliate. The ability to cross-subsidize one service with another and engage in temporary predatory pricing would be real and very tempting. The ability to offer unique combination advertising sales would be unequalled by any other advertising medium in the market, and especially independent television stations.

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[29]*Report* at 4962.

[30]Indeed, the network would be competing with itself, thereby affecting its normal competitive verve *vis-a-vis* other competitors. How this confluence of diverging competitive interests can skew a marketplace has been presented by INTV in the Commission's financial interest/syndication proceeding. *See* Further Comments of INTV, MM Docket No. 90-162, filed November 21, 1990, at Exhibit 4.

Network ownership of cable systems also would compound their power in the program acquisition marketplace. The networks already wield considerable power in the program acquisition marketplace by virtue of their network prime-time schedule and their owned and operated stations ("O&O's"). The Commission recently concluded no less.[31] The Commission also has acknowledged the ability and incentive of a cable MSO to limit competition by controlling access to its system:

> [V]ertically integrated MSOs have the ability to limit competition to particular program services. For example, it is theoretically possible for large MSOs to limit competition to vertically-owned CNN by prohibiting access to their systems by anyone proposing a "general news" service. It also appears that most cable operators have the ability to deny or unfairly place conditions on a programming service's access to the cable communities they serve, and the record in this proceeding indicates that some have done so.... In addition, vertically integrated cable operators often have the ability to deny alternative multi-channel video providers access to cable programming services in which such cable operators hold ownership interests, and there is considerable anecdotal evidence that some have used this ability in anticompetitive ways.
>
> * * * *
>
> [L]arge MSOs have the ability and incentive either to create or limit competition to particular program services.[32]

If a network were acquired by a major MSO or *vice versa,* then it would exert power over the cable programming marketplace as well, again, making competitive decisions based on factors other than just competing as strongly as possible in a single market. This would create a substantial risk that competition in the program distribution market would be curtailed.

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[31] *See* Part I, Section C, *supra.*

[32] *Report*, 5 FCC Rcd at 5031, 5045.

In the local programming market, a network holding syndication rights to an off-network program might find it far more attractive to place the program on its system or at least deny a local station the normal degree of market exclusivity.

While not INTV's direct concern, network affiliates stand to suffer in other ways if networks own cable systems in their coverage areas.[33]

Moreover, the benefits of network ownership of cable systems may be achieved less dangerously in other ways. The Commission's answer to the networks' purported problems seems inevitably to be permitting them to integrate into other markets. The Commission seems largely nonplussed by the severe consequences for the levels of competition in those markets; it seems more intent on generating another revenue source for the networks. The Commission apparently would attenuate competition in vital markets rather than confront more forcefully the fact that cable television has used an advantageous regulatory climate to grow and prosper at the expense of broadcast service.

As in the case of the financial interest and syndication rules, the Commission need not broadly deregulate and wait for blood to flow from victims of anticompetitive behavior. The benefits of free, fair competition may be presumed; the costs of stifled or skewed competition also are well-known, no proof required. This is no new concept. The Commission has stated it repeatedly in assessing its broadcast multiple ownership rules:

- Our concerns in this area have not been based upon any evidence that group ownership would necessarily lead to anticompetitive practices in local markets, however, but upon *the potential for such practices to*

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[33] *See,e.g.*, Joint Comments of the ABC, CBS, and NBC Television Affiliates Associations, BC Docket No. 82-424.

> *occur.* Indeed, we have found that "[o]n an overall basis, there has been no showing that single stations cannot cannot compete effectively with combination owners." [footnote omitted] Nevertheless, we concluded that it was *not necessary to find specific evidence of anticompetitive abuses* in order to adopt local ownership restrictions that, on balance, at that time, the public interest would be served by adopting the duopoly rule.[34]

- Finally, we do not believe that it is necessary to compile a substantial record of tangible harm to the public resulting from the present rules, as various respondents have demanded. The effect of competition or its absence, and the effects of various types of programs or the absence of programs, are matters not readily susceptible of quantitative ascertainment. [35]

- As pointed out above, the governing consideration here is power, and power can be realistically tempered on a structural basis. It is therefore no answer to the problem to insist upon a finding of some specific improper conduct or practice. The effects of joint ownership are likely in any event to be so intangible as not to be susceptible of precise definition. *The law is clear that specific findings of improper harmful conduct are not a necessary element in Commission action in this area, and that remedial action need not await the feared result.*[36]

The results of network ownership of cable, indeed, would be fearsome.

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[34]*Broadcast Multiple Ownership Rules*, 4 FCC Rcd 1723, 1724 (1989)[hereinafter cited as *BMOR*] [emphasis supplied].

[35]The Commission went on to quote the Supreme Court, observing that "In *F.C.C. v. R.C.A.*, 346 U.S. 86, 96-97, the Supreme Court recognized this problem in stating how far the Commission must go in relating the grant of its authorizations of the public interest:

> In reaching a conclusion that duplicating authorizations are in the public interest wherever competition is reasonably feasible, the Commission is not required to meet specific findings of tangible benefit. It is not required to grant authorizations only if there is a demonstration of facts indicating immediate benefit to the public. To restrict the Commission's actions to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles "by specialization, by insight gained through experience, and by more flexible procedure." *Far East Conference v. United States*... In the nature of things, the possible benefits of competition do not lend themselves to detailed forecast..."

Report and Order, Docket No. 14711, 45 FCC 1476,1482 (1964).

[36]*First Report and Order*, Docket No. 18110, 22 FCC 2d 306, 311 (1970) [emphasis supplied].